

180611fishmanC Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 MARC H. FISHMAN,

4 Plaintiff,

5 v.

18 Civ. 282 KMK

6 OFFICE OF COURT  
7 ADMINISTRATION,  
8 NY STATE COURTS,

9 Defendant.

-----x

10 United States Courthouse  
11 White Plains, N.Y.  
12 June 11, 2018  
13 4:30 p.m.

14 Before:

15 THE HONORABLE KENNETH M. KARAS,

16 District Judge

17 APPEARANCES

18 MARC H. FISHMAN, Pro Se Plaintiff

19 NY STATE OFC. COURT ADMINISTRATION  
20 Attorney for Defendant Office of Court Administration  
21 LISA EVANS

22 ALSO PRESENT: Isabel Bolivar, Note taker  
23  
24  
25

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1 (In open court)

2 THE DEPUTY CLERK: In the matter of Marc Fishman v.  
3 the Office of Court Administration.

4 Will the parties please state your appearances for the  
5 record.

6 MR. FISHMAN: Marc H. Fishman.

7 THE COURT: Good afternoon, Mr. Fishman.

8 MR. FISHMAN: Good afternoon, your Honor.

9 THE COURT: Do you want to state your appearance for  
10 the record?

11 MS. BOLIVAR: Isabel Bolivar, note taker.

12 THE COURT: Good afternoon, Ms. Bolivar.

13 MS. EVANS: Lisa Evans, Office of Court Administration  
14 Counsel's Office.

15 THE COURT: Good afternoon, Ms. Evans.

16 MS. EVANS: Good afternoon.

17 THE COURT: Please be seated, everybody.

18 So, we're here on Mr. Fishman's application for a  
19 preliminary injunction. I have read the papers. First of all,  
20 I don't know if there are any updates that either side can  
21 provide in terms of what the factual landscape is in the state  
22 court.

23 MR. FISHMAN: Yes, your Honor. I'd be happy to give  
24 you an update.

25 THE COURT: Okay. If you could, Mr. Fishman, direct

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1 the microphone towards you.

2 MR. FISHMAN: I'm sorry. Towards me?

3 THE COURT: Yes.

4 MR. FISHMAN: Should I turn this towards me?

5 THE COURT: Yes.

6 MR. FISHMAN: Is that better, your Honor?

7 THE COURT: Thank you.

8 MR. FISHMAN: Your Honor, if I may, basically for over  
9 four years now, I've been subject to disability discrimination  
10 by the Family Court, State of New York, and unable to file any  
11 grievance or file an appeal on a discrimination, because, under  
12 Article 6 and 8 of the Family Court Act, you can only file an  
13 appeal if there is permission granted. The presiding judges  
14 have denied permission, and I've tried to appeal now five times  
15 to the Appellate Division, and they have denied what they call  
16 interim appeal.

17 We're at the point where it's four years. It's  
18 excessive, all because I have a neuro-stimulator in my right  
19 chest, and a neuro-stimulator in my left for sleep apnea, and  
20 occipital neuralgia, and traumatic brain injury, and a metal  
21 hip doesn't mean a state court can keep me in Family Court  
22 forever, so that's the retaliation of this judge.

23 But just an update in terms of where we were since  
24 counsel filed their reply May 4, we have the Family Court that  
25 has a hearing tomorrow where it says if I don't bring a note

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1 taker that the magistrate will accept, that she will lead me  
2 across to Judge Katz for an incarceration hearing to have me  
3 jailed.

4 THE COURT: Wait. Say again. So, you need to --

5 MR. FISHMAN: If I don't bring a note taker.

6 We requested that the Court provide us with a note  
7 taker or provide us with the auxiliary aides of the courtrooms,  
8 which is the text-to-voice-to-transcript technology, which is  
9 in the Yonkers and White Plains court, not in the New Rochelle  
10 one, where I'm in tomorrow. It's all one courthouse. They  
11 have not replied to us regarding our request to move to that  
12 high-tech courtroom.

13 THE COURT: So, if you don't bring a note taker,  
14 what's going to happen?

15 MR. FISHMAN: She's going to take me across the way to  
16 the judge, because the magistrate can't order someone jailed,  
17 and hold a hearing to have me jailed. I have that in the  
18 transcript from May 3rd.

19 Since that time, we asked the judge --

20 THE COURT: Hang on. Have you jailed for what reason?

21 MR. FISHMAN: For not following Court orders to bring  
22 an auxiliary aide of a note taker to pay for myself. I have a  
23 transcript right here, if your Honor wants to see it.

24 THE COURT: Sure. Can you hand that up?

25 MR. FISHMAN: Sure.

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1 THE COURT: Okay.

2 MR. FISHMAN: It's on page 22 and 23, your Honor.

3 THE COURT: Just hand it up here.

4 MR. FISHMAN: Bring it up to this young lady?

5 THE COURT: Sure. Come on up.

6 MR. FISHMAN: Okay. Thank you, your Honor.

7 THE COURT: And -- this is pages --

8 MR. FISHMAN: It's 22 and 23 where she says you'll be  
9 jailed.

10 THE COURT: So, this is a transcript of a proceeding  
11 on May 3rd before --

12 MR. FISHMAN: Magistrate Carol Jordan, your Honor, in  
13 the New Rochelle court.

14 THE COURT: Magistrate --

15 MR. FISHMAN: Carol Jordan, your Honor.

16 THE COURT: Jordan. Okay.

17 You told the state court judge that the federal court  
18 signed an order requiring the state to provide a note taker?

19 MR. FISHMAN: I don't believe that's what I told them.

20 THE COURT: I'm just reading from the same transcript  
21 you were reading from.

22 Page 2, so the Court says, "Do you have a note taker  
23 that's coming today?"

24 You said, "No. As far as I know, the federal court  
25 signed an order requiring the state to provide a note taker

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1 with an injunctive request that it would start next week, and  
2 my accommodations were granted."

3 MR. FISHMAN: The only thing I informed the Court,  
4 your Honor, was that your Honor, per your assistant, allowed me  
5 to bring in a note taker here, but there are vast problems with  
6 the transcripts.

7 THE COURT: That's different than -- no, no. You  
8 represented to the state court judge that I signed an order  
9 requiring the state to provide a note taker.

10 MR. FISHMAN: I don't believe that's what I said, your  
11 Honor, but I can tell you, there's lots of inaudibles in the  
12 transcript and there's problems with the technology there, so  
13 when I do get a transcript and try to record the words, it's  
14 not always exactly what is said. There are over 87 words out  
15 of a 22-minute hearing here that are inaudible.

16 What I had told the Court was that your Honor said I  
17 can bring a note taker to federal court. She had denied  
18 bringing a note taker to her court. That's what I had told the  
19 state court.

20 THE COURT: That gets clarified at page 4. Okay.  
21 Have you seen this?

22 MS. EVANS: No, your Honor, I have not.

23 THE COURT: Do you want to take a look at it?

24 It looks like, having read it, every page of it, up to  
25 where Mr. Fishman wanted me to look, it sounds as if the judge

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1 is concerned with the particular note taker, I think it was  
2 Ms. Bolivar, that she was a potential witness in the case. So,  
3 the judge was saying you can't have somebody who is supposed to  
4 be a neutral note taker and be in the court and, at the same  
5 time, be a potential witness, which I know that there was some  
6 dispute from Mr. Fishman in that regard, but it's not as if the  
7 state court judge was saying you can't bring a note taker or  
8 I'm going to throw you in jail, or basically the judge was  
9 saying you've got to tell me who it's going to be so we can  
10 make sure it's somebody who is not a potential witness in the  
11 case or somebody who has a stake in the outcome of the case,  
12 and that's what the judge was saying. But you're welcome to  
13 take a look at that.

14 MR. FISHMAN: Your Honor, if I may add. My opposing  
15 counsel in this particular state proceeding had two note takers  
16 in the courtroom. They don't get asked who they are, they  
17 don't provide résumés, they're not even on the transcript as a  
18 record. One of them used to work for me. And then I raised it  
19 to the judge who said that's, you know, no issue.

20 So, my problem is, I have three aides. They say it's  
21 a potential witness. And the ADA, your Honor, correct me if  
22 I'm wrong, when the ADA liaison for the court, William Curry,  
23 said I could bring Ms. Bolivar and the judge says no, you  
24 can't, and you have a conflict between the liaison and the  
25 Court, no one is subjecting my ex-wife's note takers to the

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1 same ritual. And this is in one part of the Family Court. The  
2 other Family Court judge just denied note takers entirely in  
3 front of my face with Judge Schauer.

4 THE COURT: All I'm doing is, I'm addressing what you  
5 represented to be the circumstance for tomorrow, and it's not  
6 quite accurate to say that the judge said, you know, either  
7 show up with a note taker or I'm going to send you off to  
8 another judge who will send you off to jail. That's not quite  
9 accurate. It was much more nuanced than that.

10 Yes?

11 MS. EVANS: In addition, your Honor, I think the  
12 threat of a contempt proceeding had to do with the fact that  
13 there have been continuous adjournments and the judge's  
14 interest in moving the matter along, but if there's a request  
15 for an adjournment two or three times, then the matter cannot  
16 be resolved. So, I think that was the --

17 THE COURT: Also true. Yes. Exactly right.  
18 Ms. Evans is right. All right.

19 Anyways, that's where things stand. You're due to be  
20 back in court tomorrow, the same court in New Rochelle; is that  
21 right?

22 MR. FISHMAN: Right. That's where things stand with  
23 that matter. There are five appeals pending before the  
24 Appellate Division, including an ADA appeal of the ADA order,  
25 the subject of this proceeding that was calendared on May 17,



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1 your Honor. We were told there would be a decision by the end  
2 of the month. There's not.

3 THE COURT: There's an appeal pending. I think I saw  
4 that in the papers.

5 MR. FISHMAN: There's five appeals pending, yes, your  
6 Honor.

7 THE COURT: Right, but there's one particular appeal  
8 as it relates to the accommodation issues.

9 MR. FISHMAN: Yes, your Honor, one particular appeal.  
10 And we don't have an answer in terms of when that grievance  
11 will be determined.

12 Under the ADA, you're supposed to, when you file a  
13 grievance, get an answer within 30 days, when there's a state  
14 entity with 50 or more people. New York state does not observe  
15 that. In the answering papers here, they don't have any  
16 grievance. They say file an appeal.

17 You know, typically in their procedures on their court  
18 website, it says that they have a state coordinator. His name  
19 is Dan Weitz. You can file an administrative appeal. Again,  
20 we're not talking about an additional decision. We're talking  
21 about meaningful access to the courts. And then that Officer  
22 of the Court will determine an answer and then get you an  
23 administrative appeal within 15 to 30 days. Opposing counsel  
24 in the state are not exercising that procedure. They're  
25 basically just saying every judge can determine accommodations

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1 differently and nothing is the same, and you can go with a  
2 judicial appeal. And you can't even appeal under Article 6 or  
3 8.

4 And the other thing that's holding up this particular  
5 case is, under my custody cases, there's supposed to be an  
6 allocation of expenses. And because this judge is not giving a  
7 final order, it's holding up this other case, not just the  
8 accommodations. We've had four years.

9 THE COURT: One of the appeals that's pending is your  
10 claim that you were not provided reasonable accommodations.

11 MR. FISHMAN: Yes, your Honor. That's the 07752; yes,  
12 your Honor.

13 THE COURT: Right. And I understand that you say that  
14 they're out of time, but you can understand that there is, just  
15 right out of the box, there's a difficulty with a federal court  
16 weighing in on an issue that is actively being considered by  
17 the state court, because one thing you said to the judge is,  
18 well, the federal court is a higher court, and that's not true.  
19 Federal court is a different court. So, the state trial courts  
20 don't answer to a federal trial court. The state trial courts  
21 answer to the state appellate courts, just as I answer to the  
22 federal appellate courts, and ultimately the Supreme Court.

23 So, you can understand why the law is very sceptical  
24 of the federal courts weighing in, even on a very important  
25 issue such as ADA compliance, on an issue that's being

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1 considered by the state courts, because I don't get to tell the  
2 state courts, in the normal course, how to do their job, right?  
3 It's just a different jurisdiction. One isn't superior or  
4 inferior to the other. They're just different.

5 Do you understand that?

6 MR. FISHMAN: Your Honor, I do understand, but I also  
7 want to -- with all due respect to the Court, the appeal that's  
8 being considered has nothing to do with the action in front of  
9 this magistrate. This has not been appealed. We can't appeal  
10 because she hasn't issued a final order after her four years of  
11 adjournments. What's being appealed is the denial of the note  
12 taker, period --

13 THE COURT: Right.

14 MR. FISHMAN: -- in the other proceeding. So, if that  
15 proceeding comes in the affirmative, I'm not even sure it  
16 bounds this magistrate, who is in a different article of New  
17 York state law, I think it's Article 4, I don't believe it  
18 binds her at all.

19 THE COURT: That may or may not be right, but that  
20 doesn't argue for the federal court weighing in now. That kind  
21 of cuts the other way. And to the extent that there's no  
22 appealable order, I guess I'm not really sure what it is you  
23 would have me do.

24 What's the relief you're seeking right now?

25 MR. FISHMAN: The relief we're seeking right now is

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1 that during the pendency of this action --

2 THE COURT: You say "this action" --

3 MR. FISHMAN: The federal action and the state appeal,  
4 that there's no incarceration for asking for an accommodation  
5 under 28 C.F.R.

6 THE COURT: That's not really at issue here. I think  
7 that the statement that the state court judge made about  
8 incarceration had to do with delaying the proceedings by  
9 insisting on having a note taker that -- either not providing  
10 the name of the note taker or insisting on having a note taker  
11 who might be a potential witness in the case, and, therefore,  
12 delaying the proceedings.

13 MR. FISHMAN: Right, but your Honor, they pay for my  
14 ex-wife's note takers.

15 THE COURT: But see -- you should take that up with  
16 the state court judge. Again, I don't serve as a referee over  
17 the state court referee, right, and it's the state appellate  
18 courts that do. And if there's no appealable order yet, then I  
19 don't know how it is I would have jurisdiction, or should even  
20 exercise jurisdiction, to weigh in on something that is not  
21 even appealable in the state court.

22 MR. FISHMAN: Your Honor, the only issue we're here  
23 over is the Supreme Court ruling in *Tennessee v. Lane*,  
24 meaningful access to the courts. When that case was appealed,  
25 your Honor, it was during the pendency of that action. It

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1 wasn't at the end of that --

2 THE COURT: Right, but it was appealed to the Supreme  
3 Court, which has far broader -- the Supreme Court does have the  
4 authority to review the actions of state courts to the extent  
5 they touch on either federal, statutory or Constitutional law,  
6 right?

7 So, if, for example, you were to appeal, let's say,  
8 all the way to the New York Court of Appeals, right, the  
9 highest court in New York state, and you don't like their  
10 ruling, then you could go -- you couldn't come here and you  
11 wouldn't go to the Second Circuit Court of Appeals; you would  
12 go straight to the U.S. Supreme Court. They have that  
13 jurisdiction. So, that case doesn't really prove your point.  
14 That case just proves that, at the end of the day here, the  
15 ultimate court that would decide this could be the U.S. Supreme  
16 Court, but it doesn't mean you get there by way of a detour  
17 from the state courts through the federal courts. You would go  
18 straight to the U.S. Supreme Court from the New York Court of  
19 Appeals.

20 Do you understand?

21 MR. FISHMAN: Your Honor, I do.

22 And I guess if you're asking me what I'm looking for,  
23 the bottom line here, is something that opposing counsel has  
24 not addressed, which is the grievance procedure. You know, the  
25 people in the state, the administrators, the ADA liaison said I

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1 could bring three note takers. I gave them a name. He -- I  
2 gave his accommodations. A judge stopped him. In another  
3 case, the judge disallowed it.

4 So, in the New York state procedures, they define  
5 administrative accommodation in court versus judicial. All of  
6 mine have been administrative. A judge can order what a judge  
7 orders. So, our issue here -- and it's basically for anyone  
8 who is disabled, not just me, okay -- is the state basically  
9 not having a grievance procedure. So, if I could file a  
10 grievance with an ADA-experienced person, this would have been  
11 resolved a long time ago. What they're saying is, file an  
12 appeal, and then basically it's the appellate court in the  
13 country, the Second Department, which actually is even busier  
14 than the federal court -- and again, yesterday, we don't get  
15 guaranteed an order and yet you have an action pending --

16 THE COURT: I know, but the fact that you might be  
17 dissatisfied with the speed with which the appeal is being  
18 resolved, or even the merits of how the Appellate Court might  
19 handle the appeal, that doesn't mean that you still don't have  
20 to pursue that route.

21 At the end of the day, the Office of Court  
22 Administration doesn't tell judges how to rule in particular  
23 cases. It doesn't tell judges how to actually run their  
24 courtroom. As the name applies, they have an administrative  
25 support role in support of the courts. We have one, too, in

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1 the federal court. They're the reason that we don't get enough  
2 air conditioning or too much air conditioning, but they  
3 certainly don't tell me how to rule. They don't tell me - or  
4 you - what appeals you might have or don't have. They leave  
5 that up to the Court; they leave that up to the Appellate  
6 Court.

7           So, I understand your point. And you're sort of --  
8 you have this mixed world where you have what the ADA requires,  
9 right, entities to provide by way of reasonable accommodation  
10 and a grievance mechanism, so on and so forth, but then you  
11 have the actual operation of a court. And to the extent that a  
12 Court makes a legal error, to the extent the Court -- whether  
13 it's an error on the rule of law, it's an error in terms of how  
14 the rules of evidence are applied, if it's an error in terms of  
15 any sort of procedural mechanism that somebody says was denied  
16 to that person, in this case, it would be a reasonable  
17 accommodation, then the remedy when a lower court does  
18 something that is arguably in error, is to go to the Appellate  
19 Court, right? And if the Appellate Court screws that up, then  
20 you go to New York Court of Appeals, and then to the Supreme  
21 Court, but you don't get to come here, is the point.

22           I don't get to tell a state magistrate, Here's how you  
23 should apply the ADA, all right? That's for the Appellate  
24 Court to do.

25           Do you understand?

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1 I'm sympathetic to your frustration, but these are  
2 very clear rules on this, and they kind of make sense, because  
3 just think. Imagine if you're a state court judge and you're  
4 thinking, wait, I have to answer now to the state Appellate  
5 Court, I have to answer to some federal district judge in White  
6 Plains, you know, then the system kind of breaks down.

7 Do you understand?

8 MR. FISHMAN: Your Honor, I understand, again, the  
9 bureaucracy and the laws, and your Honor understands it a lot  
10 better than I do. But what I would say, with all due respect,  
11 what your Honor does have jurisdiction on, is just plain New  
12 York state with a grievance. For example, note takers are  
13 provided - in Colorado, in California, in Florida, okay, in  
14 Maryland when you have a cognitive disability, an impairment -  
15 provided as an auxiliary aide in the court.

16 And if there's a grievance, it's very specific  
17 procedures, okay. Typically, you notify someone 15 days, the  
18 state ADA coordinator, they provide it. In New York state's  
19 own Department of State website, there is a young lady in  
20 Albany that says we have to provide note takers. So, this is  
21 the Department of State, proceeding on my real estate license  
22 or a driver's license or a notary license, they would have this  
23 procedure, they'd give a note taker. You have the state here  
24 operating as its own entity where you can't even get someone to  
25 challenge them. Their Appellate Division says, Look, you



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1 should be going to the head of administration, Ninth Circuit,  
2 Judge Davidson, Judge Scheinkman. And they say you should be  
3 going to the commissioner. I went to both those places and  
4 went to the Appellate Division. The Appellate Division said,  
5 Look, we hear appeals, this is an administrative ADA matter;  
6 this is not something we appeal, unless you actually have an  
7 ADA order. Initially, we were certain that we did get an ADA  
8 order. And when we asked them to appeal it, your Honor, this  
9 was the January 25th, 2007 order, and we asked them to appeal  
10 it, originally in March, they said no. They only agreed to  
11 appeal it after the judge jailed me for not understanding her  
12 court orders for giving me such tiny print. It's a third the  
13 size of your Honor's print. You can barely read it when you  
14 have the nerve damage that I have over here.

15 So, you know, if there was a grievance procedure --  
16 and, again, New York state's acknowledged this. If you look in  
17 their website, they said -- they outline the September 26, '17,  
18 they formed a committee with Judge Richter of the Appellate  
19 Division, who I've met with, and she is very sympathetic. She  
20 said I wish you were in the First Department, you know, because  
21 this is totally unfair, you know? And they have four judges on  
22 there and they're doing recommendations, but they can't  
23 interfere in an active case. And all they're saying is, when  
24 you request ADA accommodations, Well, it's up to a judge. But  
25 on their website, it says ADA accommodation, administrative

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1 liaison granted. The liaison granted my note takers. The  
2 judge denied it. Going to one judge, they denied it. In civil  
3 court from landlord/tenant --

4 THE COURT: Let's be clear when you say deny note  
5 takers. So, to the extent that you're asking for the Court to  
6 provide note takers, that's correct, they denied that; they  
7 said you can bring your own. But they're saying the note taker  
8 can't be someone who is a potential witness.

9 Just so you know, we just finished a very long civil  
10 trial, and if there was somebody in the back of the courtroom  
11 who was a potential witness, they're actually excused from the  
12 courtroom, because, for the obvious reason, you don't want  
13 their testimony to be tainted by what they've heard in the  
14 courtroom. You want their testimony to be pure in the sense  
15 that they're going to answer the questions, answer the  
16 questions that they're asked and not have their answers in any  
17 way, even subconsciously, affected by what they've seen in the  
18 courtroom.

19 So, if you have a situation where the note taker is  
20 somebody who can be a potential witness, it's not a surprise  
21 that the judge would say, Look, just find some other note  
22 taker, just find somebody who is not a potential witness.

23 Now, to the extent that you're saying, well, there's  
24 no such scrutiny in terms of the opposing side, I understand  
25 that. Look, I don't know. The record on that is really far

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1 from clear in terms of the papers that have been submitted  
2 here, but the notion that a Court can't say you can't have  
3 potential witnesses as note takers and that violates the ADA, I  
4 think that's going to be -- that's a different argument than  
5 the relief you sought here. That's different than at least the  
6 papers that I got. And that's why I want to be clear, because  
7 I know that Judge Schauer - I think I'm pronouncing that  
8 correctly - denied a number of your requests, but also granted  
9 some requests.

10 MR. FISHMAN: She denied the note taker; you're  
11 correct.

12 THE COURT: Right. You were not denied a note taker.  
13 You just were denied the public paying for the note taker.

14 MR. FISHMAN: No. I have the order here. We were  
15 denied a note taker in front of Judge Schauer from the  
16 Appellate Division. The magistrate said he could have a note  
17 taker --

18 THE COURT: No, you were not. The wording on that is  
19 crystal clear.

20 MR. FISHMAN: Your Honor, I have it here with all due  
21 respect. It says so.

22 THE COURT: You don't need to say "with all due  
23 respect."

24 MR. FISHMAN: Page 4, the note taker is denied.  
25 That's what we appealed.

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1 THE COURT: The note taker provided by the Court was  
2 denied.

3 MR. FISHMAN: No. Any note taker provided by Judge  
4 Schauer, your Honor.

5 THE COURT: No, that's not true. That's not true.

6 MR. FISHMAN: I'd be happy to give you a copy of the  
7 order.

8 THE COURT: I have the record. I have the order.  
9 It's just not true, okay?

10 MR. FISHMAN: "[Inaudible] order that [inaudible] ADA  
11 accommodation requested by Marc Fishman be permitted to have a  
12 note taker present and to personally record the proceedings is  
13 denied." Stamped, shield, Judge Schauer.

14 THE COURT: Be careful, okay, because you're not  
15 actually being accurate in that regard.

16 You had a note taker. You had a note taker before the  
17 magistrate judge. It's just that the judge said not that  
18 particular note taker.

19 MR. FISHMAN: With all due respect, the magistrate's  
20 is now Judge Schauer's case ended last September. The appeal  
21 pending is on Judge Schauer's case. Judge Schauer denied a  
22 note taker period for me, but allowed three for my ex-wife.  
23 That's essentially the case. I have a copy of the appeal here.  
24 She denied the note taker, period, for me.

25 And the other thing is, her courtroom had

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1 transcript-to-text-to-voice-printing capability and she denied  
2 me access to that technology. That technology was in her  
3 courtroom. That's come up since we filed these papers. That  
4 eliminates the need for me to have a note taker -- to print out  
5 a transcript. But her order here, subject to appeal, the  
6 biggest issue is the note taker. Judge Schauer completely  
7 denied a note taker.

8 THE COURT: I thought it was that the person couldn't  
9 record it.

10 MR. FISHMAN: No. Completely denied a note taker,  
11 your Honor. It's right here if you want to see it.

12 THE COURT: I got it. I see what you're saying.

13 MR. FISHMAN: It was completely denied. And the issue  
14 was similar, is that, again, she allowed three or four for my  
15 ex-wife, and we only found recently that they're paid for by  
16 the Court Administration. And why they have note takers,  
17 again, is to get a transcript in state court. This one was  
18 very quick in front of Judge Schauer. It's taken five or six  
19 months, and so many inaudibles. I've been ordered to pay for  
20 them instead of having a note taker. That's cost me well over  
21 \$30,000. That's not right. That's discriminatory. Other  
22 people with cognitive disabilities aren't ordered to buy a  
23 transcript when there's transcript-printing technology in the  
24 courtroom. I also have a doctor's note, your Honor, about the  
25 need of a note taker for my cognitive rehab if your Honor needs

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1 to see a copy of that.

2 THE COURT: Okay. I guess this is -- this gets back  
3 to what I was asking for. I'm still not clear on what you're  
4 seeking today, because, obviously, Judge Schauer's order goes  
5 back to early 2017.

6 MR. FISHMAN: Right. And her proceeding ended in  
7 September; although, she hasn't issued a final order.

8 THE COURT: Right. So, we're not here to have a  
9 conversation about how that should have been done. That's  
10 done. That's over.

11 MR. FISHMAN: Right, but there's a proceeding  
12 scheduled on the 21st in her court, and she still denied any  
13 note taker, so we are here to try to get a note taker approved  
14 for that element of Family Court. We are calendared for June  
15 21st at 2:00 p.m. She has denied a note taker, period.

16 MS. EVANS: Your Honor, may I be heard.

17 THE COURT: Yes. Of course.

18 MS. EVANS: I believe that there is nothing on before  
19 Judge Schauer on the 21st. And I can represent to the Court  
20 that her decision is imminent, so I'm not sure what he's  
21 speaking about. I know he does have a proceeding tomorrow  
22 before judge -- Magistrate Jordan, but there's nothing pending  
23 before Judge Schauer except for a decision on the issues that  
24 are before her, and that is imminent.

25 MR. FISHMAN: With all due respect, I looked at

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1 WebCourts this morning, and I'm listed June 21st in front of  
2 Judge Schauer. I don't know if she's going to give the order  
3 there or what, but we are scheduled. I was told to be there at  
4 2:00 p.m. I confirmed that with counsel this morning.

5 THE COURT: Well, maybe she's going to issue her  
6 decision. I don't know. Does she issue oral rulings?

7 MR. FISHMAN: Sometimes she does, but she has denied a  
8 note taker. We were in court there June 1, Judge, and she  
9 denied a note taker. So on her end, she's completely denied a  
10 note taker. She says, Good luck with the Appellate Division.  
11 She used to work there eight years, which is probably why so  
12 many of my permissions to appeal were denied in the first  
13 place. Again, this was decided May 17. We don't even have an  
14 order. So, orders come out every Wednesday. They might have  
15 already issued an order saying you're required to have a note  
16 taker, but the whole mechanism of who approves the note taker,  
17 what type, you know, there was a grievance procedure with  
18 New York that complied with federal ADA. This would be done by  
19 the ADA liaison; it wouldn't involve the same judge.

20 I'm not opposed to bring a note taker. I gave her  
21 five names. She opposed them all because she said my ex-wife  
22 can call them all as witnesses. And I said, Well, you're  
23 providing the service; you're paying for her note takers. No,  
24 I can't do it.

25 So, it's not a matter of -- and then she has me with

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1 the ADA accommodation, bringing it to opposing counsel --

2 THE COURT: It's unclear. You're representing that  
3 the taxpayers of New York state paid for the other side's note  
4 takers?

5 MR. FISHMAN: They do. My ex-wife's is funded by  
6 Legal Services of Hudson Valley. They said they're 60-percent  
7 paid for by the Office of Court Administration.

8 THE COURT: Right, that's because she's obviously  
9 filed out some kind of an affidavit.

10 Is that how it works?

11 MS. EVANS: I would imagine, Judge.

12 THE COURT: There has to be some record that says that  
13 the person is in financial need.

14 Have you filled out any such paperwork?

15 MR. FISHMAN: I have, your Honor. And in my ex-wife's  
16 case, they waived it. My one of my attorney's is Mr. Donnelin,  
17 who's handled some insurance matter with me, he's the  
18 president [inaudible] and he said they waived it for her  
19 because she makes \$170,000 a year. She doesn't qualify. So,  
20 they give her free note takers. And we didn't know there were  
21 all these note takers until we inquired, saw all those people  
22 writing in the courtroom, and we'd object and say why does she  
23 have nine people, I have one attorney? Can I bring in my  
24 assistant? No, you can't. Can they help me lift books? No,  
25 you can't. They said no, you can't.



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1 I mean, if we didn't have a specific ADA order, which  
2 I'm glad we have from Judge Schauer, January 25th, there  
3 wouldn't be a need for appeal because there's no interim  
4 appeals left. So, if this was New Jersey or California, you  
5 would have had a 30-day grievance. You would have had an  
6 answer.

7 THE COURT: You have to get past that, okay? We're  
8 not in California and we're not in New Jersey, okay, so, it  
9 doesn't matter. They're different laws, different states. Of  
10 course, there's federal law on ADA, but there's also federal  
11 law and the extent to which federal courts can get involved.

12 Ms. Evans, is there anything else you want to add to  
13 this conversation?

14 MS. EVANS: A couple of things, your Honor.

15 THE COURT: Yes.

16 MS. EVANS: Just so that the Court is clear, the  
17 matter before Magistrate Jordan has to do with the failure to  
18 pay. It's an order for payment. There's been no payment of  
19 the child support, so that's the matter that is before her. He  
20 filed subsequent orders, I think, seeking modification, so  
21 those matters are currently before her, and I imagine that is  
22 what is on tomorrow.

23 THE COURT: Which is obviously related, but different  
24 than what he's waiting for from Judge Schauer.

25 MS. EVANS: Absolutely.

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1           And so that the record is clear, there is -- we've  
2       tried to explain to plaintiff that there's a difference between  
3       accommodations that we can make from the administrative side  
4       and accommodations that are made in the context of a judicial  
5       proceeding.

6           If someone were to request a special courtroom because  
7       they're wheelchair-bound, then that's something that we can do  
8       on the administrative end; or you have the court proceeding  
9       near a bathroom that accommodates the handicapped. That's  
10      something that we can provide on the administrative side that  
11      doesn't involve a judge.

12          However, the things that -- the requests, the  
13      accommodations that the plaintiff is requesting are all in the  
14      context of the judge's judicial proceedings and that, we cannot  
15      interfere with.

16          THE COURT: Sure. I understand that.

17          From Mr. Fishman's standpoint, what he's saying is,  
18      okay, fine, so there's no way to administratively grieve the  
19      failure to accommodate, but at the same time, he can't appeal  
20      because the Appellate Court is saying, Well, it's not a final  
21      order, so we're not going to consider it on the merits.

22          MS. EVANS: Well, right. Well, he will have -- but it  
23      does not prevent him from appealing once there's an appealable  
24      piece of paper. So, that's what Judge Schauer is at this point  
25      writing on, the final order, and he can then appeal everything.

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1           Now, the plaintiff has -- if he wants to bring a note  
2 taker at his own expense, I think the Court is willing to allow  
3 him to do that.

4           THE COURT: I mean, it seems -- I interpreted Judge  
5 Schauer's order as nobody can tape record.

6           MS. EVANS: Right.

7           THE COURT: It sounds like another way to read it is  
8 tape record or take notes.

9           MR. FISHMAN: Correct, your Honor.

10          MS. EVANS: That is not my interpretation of it,  
11 Judge. My interpretation is that he can provide a note taker  
12 at his own expense, provided it's someone who is neutral. And  
13 even if it is determined from the appeals process that the  
14 Court was wrong in requiring him to pay, there's a remedy.  
15 There's an adequate remedy at law.

16          THE COURT: That, I understand. Right.

17          So, even if Judge Schauer said, No, you can't bring in  
18 a note taker, your remedy is to order the transcript, and to  
19 the extent Mr. Fishman says that's expensive, your argument is  
20 that may be, but that's not irreparable harm.

21          MS. EVANS: No. In point of fact, the fact that he  
22 has a note taker, that doesn't obviate the need for the  
23 transcript. The notes that are taken by the note taker does  
24 not become the official record. The official record is still  
25 the transcript, which plaintiff or defendant would have to

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1 order, in any event, if they want to take an appeal. So, the  
2 note taker, I'm assuming, maybe I shouldn't, so that he could  
3 review, I guess, what went on in the court during the day. But  
4 to speak to that, he is represented by counsel, and he had an  
5 ADA advocate available.

6 The note taker is for his, whatever reason, but it  
7 doesn't speak to that being -- obviating the official record,  
8 which is the transcript, so he would have to order that anyway.

9 THE COURT: I understand. I guess, getting back to  
10 something we talked about earlier, we're waiting for some  
11 decision from the Appellate Division, is that right --

12 MR. FISHMAN: Five, your Honor.

13 THE COURT: -- on this issue?

14 MR. FISHMAN: Five appeals, three of which --

15 THE COURT: But one of them specifically deals with  
16 the accommodation.

17 MR. FISHMAN: One specifically deals, your Honor, with  
18 that January 25th order, specifically with that.

19 THE COURT: The January 25th, 2017 order?

20 MR. FISHMAN: Yes, your Honor. That's one specific  
21 appeal.

22 THE COURT: Okay.

23 MR. FISHMAN: There's another appeal for her jailing  
24 me because I didn't understand or couldn't read her handwritten  
25 orders or her two-centimeter print, okay, tiny print orders,

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1 which she jailed me for that. So, there is a risk of  
2 irrevocable harm because they have jailed me, but I want to  
3 clarify --

4 THE COURT: Hang on. Ms. Evans wanted to address  
5 that.

6 MS. EVANS: Yes, your Honor. He was not jailed for  
7 not being able to read the orders. He was jailed for violating  
8 an order of protection. He was aware of the order of  
9 protection; that is, he could only give gifts on some very  
10 limited basis to his children. He violated it by deciding that  
11 Memorial Day and Passover, I believe, were major holidays. And  
12 so when he violated the order, the Court brought him in because  
13 he had violated previous orders, and he was aware of them. He  
14 was represented by counsel at the time, an ADA advocate. There  
15 was a transcript. The judge reads everything into the record.  
16 So, he's misrepresenting that he was jailed because he couldn't  
17 read the print; he was jailed for violating an order of  
18 protection.

19 MR. FISHMAN: I disagree with that entire, your Honor.  
20 We can bring in the transcripts and we'd love to have a trial  
21 here on the matter. Counsel wasn't there, okay?

22 The order that I was jailed for for three weeks said  
23 you can send gifts on major holidays. The judge didn't specify  
24 what major holidays were.

25 THE COURT: So, you figured Memorial Day was a major

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1 holiday?

2 MR. FISHMAN: I had two attorneys interpret the  
3 order --

4 THE COURT: Really?

5 MR. FISHMAN: -- because -- then they're confusing.

6 THE COURT: If we took a poll, how many people do you  
7 think would consider Memorial Day a major holiday?

8 MR. FISHMAN: It depends. It's Passover and Easter.

9 THE COURT: Hang on. Hang on. Let's talk about  
10 Memorial Day.

11 MR. FISHMAN: Sure.

12 THE COURT: What kind of gifts does one give to  
13 children on Memorial Day? I'm curious.

14 MR. FISHMAN: Well, we have a veteran in the family.

15 THE COURT: We all have veterans in the family.

16 MR. FISHMAN: Right.

17 THE COURT: I've never heard of somebody making a big  
18 deal out of Memorial Day as a gift-giving event for children.

19 MR. FISHMAN: Well, if the judge wanted to prohibit,  
20 she could have said don't give any gifts. What she did say in  
21 the transcript, that I didn't remember, was she said there are  
22 no gift-giving holidays between March and July, your Honor,  
23 there are no birthdays. And two of my kids' birthdays are  
24 between, okay? And she jailed me for three weeks. And the  
25 order was handwritten. It was handwritten in this tiny print

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1 here.

2 THE COURT: So, one of the things, I forget which  
3 judge, it might have been Judge Schauer -- why can't you take a  
4 magnifying glass and read these orders or have somebody read  
5 them to you?

6 MR. FISHMAN: Oh, I have occipital neuralgia.

7 THE COURT: So why can't you have somebody read them  
8 to you?

9 MR. FISHMAN: I did have them read it to me, and I had  
10 interpretation.

11 THE COURT: So, the problem wasn't that you didn't  
12 know what the order said. The problem was you had a difference  
13 of opinion as to how to interpret it.

14 MR. FISHMAN: No, your Honor.

15 THE COURT: Yes. You just admitted you had somebody,  
16 a lawyer tell what the order said, --

17 MR. FISHMAN: Right.

18 THE COURT: -- and then, you decided that that didn't  
19 bar you from giving gifts for Memorial Day.

20 MR. FISHMAN: No, your Honor. I think, your Honor --  
21 it took six months to get the transcript. So, we got the  
22 transcript back. It said Mr. Fishman, I want to let you know,  
23 it was an April -- it March 16th -- there are no holidays  
24 between, so I expect that you won't make gifts. Then she said,  
25 will you remember it? The other side had a note taker. So

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1 then when they put me on trial, do you remember she told you  
2 that? No. We went by the order. What did the order say? You  
3 can send gifts on major holidays.

4 By the way, the gifts are necessities. She didn't  
5 [inaudible] gifts from my mother, aunt. She said they were all  
6 from me. She didn't care about receipts. She didn't care.  
7 She just jailed me. It's not something you get jailed for,  
8 okay? And I think five previous orders --

9 THE COURT: You know what? That has nothing to with  
10 the accommodation. You can get somebody to read you the order.  
11 It's not a lengthy order. You relied on it. You say there  
12 were interpretations of that order given by your attorneys,  
13 that's on them if that's really what their interpretation was,  
14 but that's really not an ADA issue.

15 MR. FISHMAN: It's retaliation, your Honor. This  
16 whole thing is retaliation.

17 THE COURT: Retaliation? Whose retaliation?

18 MR. FISHMAN: Not issuing a final order?

19 THE COURT: Your lawyer said you can give the gifts.

20 MR. FISHMAN: Correct.

21 THE COURT: Okay. So, the issue wasn't that you  
22 didn't know what the order said. The issue was, your lawyers  
23 told you to interpret it a certain way. The judge had a  
24 difference of opinion, that happens, and you paid the price.  
25 So, you should talk to your lawyers about their interpretation,



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1 but I don't understand this notion that you didn't know what  
2 the order said.

3 MR. FISHMAN: Well, your Honor, the order said you can  
4 send gifts on major holidays and birthdays.

5 THE COURT: Right. And they said -- they interpreted  
6 that to mean, shockingly I might add, that that includes  
7 Memorial Day.

8 MR. FISHMAN: And Passover and Easter; right.

9 THE COURT: Okay, all right, but Memorial Day? That  
10 was on them. That was their interpretation. It's not a  
11 question of you didn't know what the order said because the  
12 print was too small; it was a question of you and your lawyers  
13 decided that you can give gifts for Memorial Day.

14 MR. FISHMAN: Okay.

15 THE COURT: The judge said no, that's not what I  
16 meant.

17 MR. FISHMAN: So for this mistake, your Honor, I  
18 haven't been able to send a gift to my kids now for two  
19 and-a-half years though I don't have a final order?

20 THE COURT: That's not something that we deal with --

21 MR. FISHMAN: It's retaliation.

22 THE COURT: It has nothing to do with the application.  
23 That's something, if you were upset about that, you could have  
24 appealed that to the Appellate Division.

25 MR. FISHMAN: We did. And that's one of the things

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1 that was decided. So, the Appellate Division rules in my favor  
2 and says we didn't violate it, then we can seek damages in this  
3 court.

4 THE COURT: Not in this court. In that court.

5 MR. FISHMAN: Well, they don't handle damages.

6 THE COURT: No, no, no.

7 You need to understand this, and I'm going to be more  
8 detailed about this in a minute, this is not a place you go  
9 because you're dissatisfied with state court rulings. It's not  
10 the default. There are exceptions, of course, but you've got  
11 to satisfy those criteria.

12 But if somebody loses in state court, they don't get  
13 to run to federal court and say, Undo the unsatisfactory state  
14 court ruling. That's not the default rule. That's the  
15 exception, okay?

16 MR. FISHMAN: Your Honor, I understand that, but I'm  
17 saying if they rule in the affirmative that the order was  
18 illegal, that she did discriminate, if we have a lawsuit here  
19 for compensatory damages --

20 THE COURT: Hang on. Did the Appellate Division say  
21 she discriminated or did they say that the order was --

22 MR. FISHMAN: They haven't issued a final order yet.  
23 We're told it was decided the 17th. We're waiting for it to  
24 be typed up.

25 THE COURT: That's my point. To the extent that you

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1 think the state Appellate Division could find that she  
2 retaliated against you or discriminated against you, then  
3 that's where your relief lies, not in federal court.

4 MR. FISHMAN: I have to sue there for money?

5 THE COURT: Yes.

6 MR. FISHMAN: I thought compensatory damages is if  
7 there's some determination made that she discriminated by a  
8 court, you sue here or there.

9 THE COURT: Hopefully, you learned that from a  
10 different lawyer than somebody who thinks Memorial Day is a  
11 major holiday where you give gifts to kids.

12 Anything else that either one of you wants to add to  
13 what's in the papers?

14 MR. FISHMAN: Yes. The large print, these  
15 half-centimeter orders, even your Honor's website it says you  
16 need 12-point print, these handwritten things. Judge Schauer  
17 refused. She said she'll give hand-written orders. She denied  
18 that. That's part of the appeal.

19 THE COURT: Why can't you get somebody to read to you  
20 what the order says? You have lawyers in these cases. Why  
21 can't they just read to you what the order says?

22 MR. FISHMAN: Well, in some of the cases, they can't  
23 read, your Honor. Some of them have been in small margins or  
24 handwritten on the bottom.

25 THE COURT: Come on. Judges do handwritten memo

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1 endorsements all the time, all the time. And sometimes their  
2 handwriting is pretty and sometimes it's dreadful, but at the  
3 end of the day, if you need help reading it, you can get  
4 somebody to read it.

5 The reason they're handwritten is precisely because  
6 they're not long, right? So, nobody's handwriting-out a  
7 20-page opinion or order. Those are typed out. But I get  
8 about 6 to 12 inches' worth of mail every couple of days, and  
9 at the bottom, I will note "application granted," "application  
10 denied," "I'm going to ask the other side to respond." And  
11 it's not me, I'm not smart enough to be creative, that's what  
12 every judge does, because that's the only way to move the  
13 docket.

14 You got somebody -- you have any number of people, you  
15 have lawyers representing you who read these things all the  
16 time. They can tell you if it says "granted" or "denied" or  
17 what it is that's being required typically of the lawyers, by  
18 the way, right?

19 So, why can't that be a solution?

20 MR. FISHMAN: Well, the lawyers, again, appointed in  
21 this particular case, they said they aren't appointed, an ADA  
22 advocate --

23 THE COURT: It's not a question of that. If you want  
24 to know what order says, the lawyer should tell you what the  
25 order says.

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1 MR. FISHMAN: They say order a transcript.

2 THE COURT: No, come on. It's not a transcript.

3 There's no transcript of an order.

4 If a judge memo-endorses a letter, that becomes a part  
5 of the docket. There's no transcript of the memo endorsement.

6 MR. FISHMAN: With all due respect, your Honor, the  
7 reason the appeal was held up, the last one from Judge Schauer,  
8 she so ordered the transcript, and I had to pay for it.

9 The one issue I want to address, again, is the  
10 grievance procedure. We wouldn't even be here if there was a  
11 grievance procedure with some experienced ADA liaison, which is  
12 required at the federal level, which the court in New York  
13 seems to be exempt, where they handle the procedure, you file a  
14 complaint, you've got to respond in 30 days.

15 THE COURT: I've heard you on that point.

16 MR. FISHMAN: That's my biggest issue. I wouldn't be  
17 here if I had that, because the point is, the powers that be  
18 would have already resolved it.

19 THE COURT: Do you want to address that point,  
20 Ms. Evans?

21 MS. EVANS: There is a process in place if it's on the  
22 administrative end, your Honor, as I represented earlier.

23 THE COURT: Okay. All right.

24 So, as I said, Mr. Fishman is here on a motion for a  
25 preliminary injunction, and he is seeking an order, I think,

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1 that would require the Office of Court Administration, because  
2 that's really the only entity that is sued here, for the New  
3 York State Courts, to provide him with reasonable  
4 accommodations for his disabilities, which are undeniably true,  
5 including a qualified note taker, an aide for the court program  
6 of visitation, and large-print court orders. Mr. Fishman also  
7 seeks a preliminary injunction that would order the Office of  
8 Court Administration not to jail him again for making  
9 disability accommodation requests and/or communicating to the  
10 state entity about disability accommodations.

11 As I said, Mr. Fishman does suffer from a number of  
12 very serious syndromes and conditions, including traumatic  
13 brain injury, post-concussion syndrome, sleep apnea, and a few  
14 others, one is called -- the acronym is TMJ. And there are a  
15 number of different instances in which Mr. Fishman says that  
16 his ADA rights have been violated by the state Family Court;  
17 for example, to bring a note taker, permission to tape or video  
18 record proceedings, to refuse to issue large-print orders or  
19 orders that are not handwritten in small print, as well as  
20 permission to present testimony of experts regarding his  
21 disability, and then child visitation at his house while he was  
22 recuperating from surgery.

23 Back in January of 2017, as we've talked about,  
24 Judge Schauer had granted plaintiff's request for an  
25 adjournment and for permission to wear sunglasses, as well as

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1 his request to bring in an ADA advocate to court appearances;  
2 however, the judge denied the request for the accommodation on  
3 behalf of one of Mr. Fishman's children on the ground that he  
4 lacked standing. She denied a request for visitation during  
5 recuperation from surgery, which, in the Court's view, sought  
6 judicial determination of legal rights in the guise of an  
7 accommodation request, and also denied the permission to have  
8 somebody bring a recording device during court proceedings, and  
9 also to bring a note taker on the theory that Mr. Fishman could  
10 order court transcripts.

11 It should be noted that Judge Schauer noted that  
12 plaintiff had appeared approximately 14 times between January  
13 of 2015 and September 2016, which postdates the cause of much  
14 of Mr. Fishman's disabilities, without any difficulties, and  
15 also noted that Mr. Fishman had, in fact, been ordering court  
16 transcripts.

17 Now, on June 21st of 2017, Judge Schauer denied  
18 plaintiff's request that all Family Court orders be typed in  
19 12-point font, specifically noting that sometimes she did  
20 handwritten orders, which were necessary to provide immediate  
21 relief to the parties.

22 On March 30th of this year, the Family Court rejected  
23 plaintiff's request that the Family Court provide a, quote,  
24 "ADA aide" to assist during child visitations, but did allow  
25 Mr. Fishman to provide one at his own expense pending approval

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1 from the mother's and children's respective attorneys.

2 Also, on April 11th of this year, Magistrate Jordan  
3 denied plaintiff's request that the Family Court provide a note  
4 taker, but allowed a neutral note taker to be brought at his  
5 own expense. And this was something that we talked about in  
6 terms of avoiding the note taker being a potential witness.

7 Now, I think the other salient facts that are worth  
8 noting here is the point here that's been made by Ms. Evans,  
9 that the OCA piece on this deals with the administrative side.  
10 So, for example, back in September of 2016, Nancy Mangold, who  
11 is the Director of the OCA Division of Court Services and  
12 District Executive in the Ninth Judicial District, explained to  
13 Mr. Fishman in a letter that she had reviewed the paperwork,  
14 she reviewed OCA's practice and policy, and, specifically, that  
15 policy provides that if somebody has a pending case before a  
16 judicial officer and the party makes an ADA accommodation  
17 request, the request is to be made to the judicial officer and  
18 not to the Office of Court Accommodation.

19 And to the extent that a judicial officer denies an  
20 accommodation request, it is a judicial determination and not  
21 an administrative one that is subject to judicial rather than  
22 administrative review. So, whatever the rule is in California  
23 or New Jersey or Nebraska, that's how OCA has explained things  
24 work in New York state. So, what that means is that the OCA is  
25 really not in a position to review judicial rulings of judges



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1 in terms of how it is that they decide on everything from  
2 accommodations that are made in connection with visitation  
3 requests, to accommodations as to how a judge runs his or her  
4 courtroom. And this was echoed in another letter from  
5 James Garfein, who is counsel to the administrative judge who  
6 wrote to Mr. Fishman that OCA was unable to consider his  
7 application for certain accommodations because they had been  
8 ruled on by Judge Schauer in the context of an ongoing Family  
9 Court proceeding, and her determinations were subject to  
10 judicial review, not administrative review.

11 And you all will correct me if I'm wrong about this,  
12 but after the January 2017 order, there was an appeal to the  
13 Appellate Division which issued a decision and order dismissing  
14 Mr. Fishman's appeal because, quote, "No appeal lies as of  
15 right from a nondispositional order in a proceeding pursuant to  
16 Family Court Act Article 8, and leave to appeal has not been  
17 granted."

18 But I gather that there's a separate appeal that's  
19 still pending, so everybody is waiting for a decision. Right,  
20 Mr. Fishman, you said it relates back to the January 2017  
21 order? That's what you had said earlier, so I just want to  
22 make sure that's correct.

23 MR. FISHMAN: We're hoping, your Honor.

24 THE COURT: Okay.

25 MR. FISHMAN: There have been five denials of

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1 interim --

2 THE COURT: Right, but you're waiting for another  
3 decision --

4 MR. FISHMAN: We're hoping.

5 THE COURT: -- as to the January 25, 2017 order by  
6 Judge Schauer?

7 MR. FISHMAN: Correct. We're hoping.

8 THE COURT: In the meantime, Judge Schauer apparently  
9 has reserved decision on the ultimate merits of the proceedings  
10 before her, and her decision is also pending, but we don't know  
11 when that decision is going to be issued.

12 MR. FISHMAN: Correct. We were told by OCA in writing  
13 actually the 9th, there was an exec that we'd have it by the  
14 end of May. And as recently as Thursday, we were told by Nancy  
15 Barry that it's in Judge Davidson's hand, that Judge Schauer  
16 has been telling everyone she would issue orders, issue orders,  
17 and we have not received one for months now.

18 THE COURT: All right.

19 And then there's other correspondence in the record  
20 about the distinction here between administrative and the sort  
21 of legal determinations of certain accommodation requests.

22 I think Ms. Evans has very helpfully given some  
23 examples of where the OCA might get involved on some matters,  
24 but other matters that are dealt with by judges stay within the  
25 judicial system.

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1           For example, on March 13th of this year,  
2   Ms. Aprilanne Agostino, Clerk of the Court for the Appellate  
3   Division, the Second Judicial Department, responded to a  
4   memorandum from Mr. Fishman and noted that he had been asking  
5   for some determinations made in Family Court regarding certain  
6   accommodations. And she specifically noted that pending before  
7   the Second Department was an appeal taken on his behalf of a  
8   Family Court order dated back in June 27 of 2017. And of  
9   course, one of the issues that had been raised in connection  
10   with that appeal was the request for accommodation.

11           So, it sounds like that's the one you're talking  
12   about, Mr. Fishman.

13           MR. FISHMAN: That was dismissed, your Honor.

14           THE COURT: That was dismissed after you submitted  
15   your papers?

16           MR. FISHMAN: Correct, Judge.

17           THE COURT: Okay.

18           MR. FISHMAN: They refused permission to appeal that  
19   issue. We're hoping, and, again, there's no guarantee -- as  
20   you said, judges have enormous discretion -- we're hoping with  
21   the appeal of the incarceration, that they will issue a  
22   decision on the ADA, but they could defer it, you know? So,  
23   they have denied five times permission to file the grievance  
24   and cited that the law and Article 6 and 8 doesn't allow  
25   interim appeals. So, as long as Judge Schauer keeps this case

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1 open, which it has now been open four years - her average case  
2 is nine months - over four years, as retaliation for me, okay,  
3 there is no method of having a grievance; whereas, if I was in  
4 [inaudible] court or --

5 THE COURT: You've made that point, and I don't think  
6 we need to echo it. I understand the point.

7 So then what happened in the meantime, Judge Schauer  
8 issued an interim decision order on March 30th of this year,  
9 which noted that there was an order of custody and visitation  
10 going back to May of 2014, which the mother had petitioned to  
11 modify.

12 Judge Schauer had held hearings back in August and  
13 September of 2017. There were written submissions filed in  
14 December of 2017. And that's the decision everybody is waiting  
15 to get back from Judge Schauer.

16 And Judge Schauer has noted about Mr. Fishman's  
17 repeated demands in what Judge Schauer describes as under the  
18 guise of ADA accommodations for a variety of assorted relief,  
19 including unsupervised access to the children, which the Court  
20 had denied. And the Court also noted that to the extent that  
21 Mr. Fishman has asserted that he does not need supervision by a  
22 professional supervisor and the Court should give him an aide  
23 to assist with the visits because of his disabilities, the  
24 Court rejected that, because that, in the Court's view, was not  
25 the type of ADA accommodation; rather, it went to the merits of

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1 the requested relief.

2 Also, Judge Schauer noted that if Mr. Fishman chooses  
3 to secure an aide to be present during the visits to assist him  
4 with the care of the children prior to the visit taking place,  
5 he has to provide the name and the CV or résumé and contact  
6 information of that aide to his attorney, Ian Spier, who then  
7 has to provide the information to the mother's attorney and the  
8 attorney for the children.

9 And then we get to the April 11th proceeding, which  
10 I think is the transcript you had shown me, Mr. Fishman, that  
11 the Court there rejected the idea of having a note taker who  
12 was a potential witness in the proceedings; and that, to the  
13 extent that delays were being sought because of the issue with  
14 the note taker, that's when the Court threatened to refer the  
15 case over to another judge, who could, I guess, back up a  
16 contempt determination with jail.

17 Now, in terms of the standard of review, a preliminary  
18 injunction is an extraordinary remedy that's never awarded as  
19 of right, said the U.S. Supreme Court in *Winter v. Natural*  
20 *Resources Defense Council, Inc.*, 555 U.S. 7, 24. Thus, the  
21 party seeking preliminary injunction must ordinarily establish,  
22 first, irreparable harm; and second, either (a) a likelihood of  
23 success on the merits or (b) sufficiently serious questions  
24 going to the merits of the claims to make them fair ground for  
25 litigation; plus a balance of the hardships tipping decidedly

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1 in favor of the moving party; and that a preliminary injunction  
2 is in the public interest. That's all from *New York ex rel. v.*  
3 *Schneideman v. Actavis PLC*, 787 F.3d 638, 650.

4 However, a heightened standard is appropriate where  
5 the injunction is mandatory or the injunction will provide the  
6 movant with substantially all the relief that he seeks, and the  
7 relief can't be undone, even if the defendant prevails at the  
8 trial on the merits. And the Court finds that the heightened  
9 standard applies here because Mr. Fishman is requesting a  
10 mandatory injunction seeking to alter, rather than maintain,  
11 the status quo. That's a key component of that analysis as  
12 noted in *New York Civil Liberties Union v. New York City*  
13 *Transit Authority*, 684 F.3d 286, 294.

14 So, a mandatory injunction is to be granted only upon  
15 a, quote, "Clear showing that the moving party is entitled to  
16 the relief requested or where extreme or very serious damage  
17 will result from a denial of preliminary relief." That's from  
18 *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d  
19 27, 34 (2d Cir. 1995). Although, the Court notes that I think  
20 even if the lesser rigorous standard applied, the result here  
21 would be the same.

22 Now applying the test, first is the likelihood of  
23 success on the merits, and there are very serious questions  
24 here because of something called the *Rooker-Feldman* doctrine.  
25 And under this doctrine, federal district courts lack

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1 jurisdiction over cases that essentially amount to appeals of  
2 state court judgments. That's a quote from *Vossbrinck v.*  
3 *Accredited Home Lenders, Inc.*, 773 F.3d 423, 426. And this is  
4 because Congress' grant of federal jurisdiction to review final  
5 state court judgments pursuant to 28 U.S.C. Section 1257 "vests  
6 authority to review a state court's judgment solely" in the  
7 hands of the United States Supreme Court. And that's noted in  
8 *Exxon Mobil Corp. v. Saudi Basic Industry Corp.*, 544 U.S. 280,  
9 292.

10 Now in *Exxon Mobil*, the Supreme Court did emphasize  
11 that the *Rooker-Feldman* doctrine is narrow and only applies to  
12 federal lawsuits brought by, quote, "State-court losers  
13 complaining of injuries caused by state-court judgments  
14 rendered before the district court proceedings commenced and  
15 inviting district court review and rejection of those  
16 judgments." That's at page 284.

17 So, after *Exxon Mobil*, the Second Circuit reexamined  
18 *Rooker-Feldman* and laid out four requirements that must be met  
19 before the doctrine would apply: First, the federal court  
20 plaintiff must have lost in state court; second, the plaintiff  
21 must complain of injuries caused by a state-court judgment;  
22 third, the plaintiff must invite district court review and  
23 rejection of that judgment; and fourth, the state-court  
24 judgment must have been rendered before the district court  
25 proceedings commenced. And that's all noted from *Green*, a

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1 Second Circuit case decision, *Green v. Mattingly*, 585 F.3d 97,  
2 101, quoting from the original decision that set out these four  
3 factors, which is *Hoblock v. Albany County Board of Elections*,  
4 422 F.3d 77, 85. The first and fourth requirements have been  
5 deemed or termed procedural, while the second and third are  
6 called substantive.

7 *Rooker-Feldman* does not bar independent claims, even  
8 if those claims deny a legal conclusion that a state court has  
9 reached in a case to which the plaintiff was a party, and  
10 that's from *Exxon* at 293.

11 So, the applicability of *Rooker-Feldman* turns not on a  
12 similarity between the party's state-court and federal-court  
13 claims, but, rather, on the causal relationship between the  
14 state-court judgment and the injury of which the party  
15 complains in federal court. That distinction was made clear in  
16 the Second Circuit's decision in *McKithen v. Brown*, 481 F.3d  
17 89, 97-98. But on the other hand, raising, in federal court, a  
18 legal theory that was not raised in state court does not  
19 insulate a federal plaintiff's suit from the *Rooker-Feldman*  
20 doctrine as noted in *Hoblock* at page 86. Rather,  
21 *Rooker-Feldman* bars a federal claim, whether or not raised in  
22 state court, that asserts injury based on a state-court  
23 judgment and seeks review and reversal of that judgment, and  
24 that's because such a claim is inextricably intertwined with a  
25 state judgment. And that's also from *Hoblock* at 86, 87.



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1           So, to the extent the injunction seeks to, in effect,  
2           overturn the January 25, March 30, and April 11 Family Court  
3           orders, and also the June 21, 2017 oral decision regarding the  
4           accommodation requests, then that's essentially, in this  
5           Court's view, an appeal of the state court's decision, and that  
6           runs headlong into *Rooker-Feldman*.

7           So, to begin, in terms of applying the four factors,  
8           Mr. Fishman obviously lost those requests in state court, those  
9           applications were rejected, which makes him the loser in the  
10          state court. And I'm not going to repeat what I said earlier  
11          about what the state courts had ruled and rejected on  
12          January 25, 2017, June 21 of 2017, March 30 of 2018, and  
13          April 11, 2018.

14          Secondly, Mr. Fishman clearly is complaining of  
15          injuries caused by the judgments themselves. The gravamen of  
16          his complaint, really the heart of his complaint, is that the  
17          Family Court's denial of his request of ADA accommodations  
18          violated his rights under the ADA because they didn't account  
19          or accommodate his disabilities and denied him meaningful  
20          access to the courts, which were directly caused, Mr. Fishman  
21          says, by the Family Court decisions.

22          Third, I think there's no question that Mr. Fishman is  
23          inviting this Court to review and reject those state court  
24          judgments. And in particular, he has requested that this Court  
25          order the Family Court to provide the requested accommodations

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1 that were denied by the Family Court on the  
2 previously-mentioned dates, and that's exactly what he's  
3 seeking.

4 And the fourth factor, the state-court judgment at  
5 issue here had been rendered before the district court  
6 proceeding commenced; that's clear because, to the extent the  
7 complaint was filed in this case on January 1st, the request  
8 for a preliminary injunction wasn't filed until April 24th,  
9 which postdates all four of the relevant dates of the relevant  
10 and challenged state-court orders. Therefore, the Court finds  
11 that Mr. Fishman's request is undercut by *Rooker-Feldman*, which  
12 is another way of saying that he does not establish a  
13 likelihood of success on the merits.

14 And since we're all, I guess, citing out-of-state  
15 authority, I'll note one case called *Makeen v. Colorado*, which  
16 is reported at 2016 WL 8470186, at \*8, which is a District of  
17 Colorado decision, which dealt with a very similar request for  
18 accommodations in state court, and the federal court there  
19 rejected it on *Rooker-Feldman* grounds.

20 Now, to the extent that Mr. Fishman seeks an  
21 injunction over ongoing proceedings regarding the child custody  
22 issues, then the Court would be inclined to abstain under  
23 *Younger v. Harris*, 401 U.S. 37.

24 Under *Younger*, federal courts should generally refrain  
25 from enjoining or otherwise interfering in ongoing state

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1 proceedings, noted the Second Circuit in *Spargo v. New York*  
2 *State Commission on Judicial Conduct*, 351 F.3d 65, 74.

3 Now, it's true that abstention generally is disfavored  
4 and federal courts have a virtually unflagging obligation to  
5 exercise their jurisdiction, said the Second Circuit in *Niagara*  
6 *Mohawk Power Corp. v. Hudson River-Black River Regulating*  
7 *District*, 673 F.3d 84, 100.

8 And also, unlike *Rooker-Feldman*, *Younger* is more of a  
9 prudential limitation grounded in considerations of comity,  
10 rather than a jurisdictional bar derived from Article III of  
11 the Constitution. The Supreme Court has, nonetheless,  
12 clarified that a district court should abstain from exercising  
13 jurisdiction in three exceptional circumstances involving  
14 ongoing state criminal proceedings, certain civil enforcement  
15 proceedings, and civil proceedings involving certain orders  
16 uniquely in furtherance of a state court's ability to perform  
17 its judicial function. That was discussed in the Second  
18 Circuit's decision in *Falco v. Justices of the Matrimonial*  
19 *Parts of Supreme Court of Suffolk County*, 805 F.3d 425, 427,  
20 quoting the Supreme Court's decision in *Sprint Communications*  
21 *v. Jacobs*, 134 S. Ct. 584, 591. And these three exceptions  
22 really define the scope of the *Younger* abstention doctrine.

23 Now, there are some other factors to be considered,  
24 including whether the ongoing state judicial proceedings  
25 provide an adequate opportunity to raise federal challenges.

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1           So, the *Younger* abstention is required when three  
2 conditions are met: First, there's an ongoing state  
3 proceeding; second, an important state interest is implicated  
4 in the proceeding; and third, the state proceeding affords a  
5 federal plaintiff an adequate opportunity for judicial review.  
6 That's from *Diamond "D" Construction Corp. v. McGowan*, 282  
7 F.3d 191, 198. Here, those three criteria are met.

8           First, the state court proceedings regarding the  
9 appropriate child custody arrangement are still ongoing.  
10 Everybody is waiting for Judge Schauer's decision, and there  
11 are related proceedings going on before Magistrate Jordan.  
12 Moreover, child custody disputes are typically reserved for  
13 state courts. So, the state courts or a state's interest in  
14 general is very high. Among other cases noting this is *Puletti*  
15 *v. Patel*, 2006 WL 2010809, at \*4 (E.D.N.Y. July 14, 2006),  
16 where the court there noted, quote, "The whole subject of the  
17 domestic relations of parent and child belongs to the laws of  
18 the state and not to the laws of the United States." Thus,  
19 this case undoubtedly touches on important state interests.

20           And finally, Mr. Fishman would have an adequate  
21 opportunity for judicial review in state court. While his  
22 interim appeals thus far have not proven successful, he still  
23 has been able to file those appeals. And it's clear that even  
24 if the state Appellate Court's view has requested relief from  
25 the lower court decisions as awaiting a final judgment, that

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1 final judgment is apparently imminent.

2 Now, beyond all of this, there is the question of  
3 irreparable harm, and higher courts have said that this, in  
4 fact, might be the most important prerequisite to getting a  
5 preliminary injunction.

6 To satisfy this requirement, plaintiff has to  
7 demonstrate that absent a preliminary injunction, the plaintiff  
8 will suffer injury that is neither remote nor speculative, but  
9 actual and imminent and one that cannot be remedied if the  
10 Court waits until the trial to resolve the harm; and that  
11 typically involves, for example, a situation where a monetary  
12 award cannot adequately compensate a plaintiff for the harms  
13 the plaintiff allegedly suffered.

14 Here, the request for the note taker does not satisfy  
15 this requirement. At least Magistrate Jordan is willing to let  
16 Mr. Fishman bring a note taker, just as long as the note taker  
17 is not a potential witness. And moreover, Judge Schauer said  
18 that while Mr. Fishman couldn't bring somebody to tape record  
19 or even take notes, that he could have ordered the transcript,  
20 and there's been nothing to suggest -- in fact, it's noted that  
21 he has done that -- and so there's nothing to suggest that he  
22 can't do that.

23 And to the extent that the Court understands that  
24 transcripts aren't cheap, to the extent that there is a  
25 monetary recovery to be had here, that undercuts any theory

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1 that the harm here is irreparable.

2 Also, the request for an ADA aide does not satisfy  
3 this requirement. Again, the Family Court permitted him to use  
4 an ADA aide as long as the individual met with approval and as  
5 long as Mr. Fishman was willing to pay for the aide.

6 The 12-point font doesn't satisfy this requirement.  
7 The Family Court noted that most of its orders were in 12-point  
8 font, and, except for occasional handwritten orders, which are  
9 done to provide immediate relief, these orders are read on the  
10 record according to Family Court, thus available by way of the  
11 transcripts. Plus, Mr. Fishman has been represented by counsel  
12 in these proceedings, and they can read the orders to him.

13 The allegations regarding the contempt, the potential  
14 jail time certainly raise imminent concerns but fail on the  
15 merits because, as I said, the issue is not so much the  
16 accommodation; the issue is making sure that any note taker is  
17 somebody who is not a potential witness, and there, the Court  
18 is acting within its authority to protect the integrity of any  
19 hearings, which, of course, they want to have witnesses who are  
20 untainted by whatever they have learned in a courtroom.

21 The balance of hardships factor: Because plaintiff  
22 hasn't gotten past these first two, I think it really doesn't  
23 change the analysis. So while it may cut slightly in favor of  
24 plaintiff, it's more than outweighed by plaintiff's failure to  
25 satisfy the other requirements.

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1           The public interest I think is a wash. There  
2 certainly is always a public interest in accommodating  
3 individuals dealing with disabilities, but also, there is a  
4 public interest in making sure that the Family Court  
5 proceedings are done in ways that are fair to all parties. And  
6 in any event, as I said, even if that cut in favor of  
7 plaintiff, it would not be enough to overcome plaintiff's  
8 failure to satisfy the likelihood of success on the merits of  
9 the irreparable harm criteria.

10           So, for those reasons, the request for a preliminary  
11 injunction is denied without prejudice to see what happens  
12 going forward in the state court.

13           Is there anything else?

14           MS. EVANS: Judge, at an earlier letter, dated  
15 April 23rd, we requested a pre-motion conference. So, we'd  
16 like to either resolve that today or --

17           THE COURT: I think what we should do is just set a  
18 schedule.

19           MS. EVANS: Okay.

20           THE COURT: Before I do that, I want to give --  
21 Mr. Fishman, do you want to amend your complaint at all?

22           MR. FISHMAN: Yes, your Honor.

23           THE COURT: So, when do you think you can amend your  
24 complaint by?

25           MR. FISHMAN: If I could have about 30 days.

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1 THE COURT: Sure.

2 MR. FISHMAN: I'd appreciate that.

3 THE COURT: No problem. Let's say that your amended  
4 complaint will be due July 9.

5 Is that good?

6 MR. FISHMAN: Yes, your Honor. Thank you.

7 THE COURT: And then within your time to answer,  
8 Ms. Evans, you'll either answer or you can file another  
9 pre-motion letter suggesting a briefing schedule.

10 MS. EVANS: Yes, your Honor.

11 THE COURT: And either I'll bring you all in again or  
12 I'll just set a briefing schedule, okay?

13 MS. EVANS: Thank you, your Honor.

14 THE COURT: Now, as I said, if there are things that  
15 happen in state court that alter the factual landscape,  
16 Mr. Fishman, I'm sure you'll either include those in your  
17 amended complaint or otherwise let us know in writing, okay?

18 MR. FISHMAN: Yes.

19 THE COURT: Anything else?

20 MR. FISHMAN: One question for the Court, since we are  
21 on the calendar with Judge Schauer for June 21st for a  
22 hearing, am I allowed to bring a note taker, or is this Court  
23 declining to get involved --

24 THE COURT: I'm not requiring that at all.

25 MR. FISHMAN: Okay. Thank you.



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1 THE COURT: Then we are adjourned. Thank you.

2 MS. EVANS: Thank you.

3 MR. FISHMAN: Thank you.

4 - - -

5 Certified to be a true and correct

6 transcript of the stenographic record

7 to the best of my ability.

8 

9 U.S. District Court  
Official Court Reporter

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